



July 18, 2002

Mr. W. Lane Lanford
Executive Director
Public Utility Commission of Texas
P.O. Box 13326
Austin, Texas 78711

OR2002-3953

Dear Mr. Lanford:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 165199.

The Public Utility Commission of Texas ("PUCT") received requests for (1) reimbursement reports filed by Retail Electric Providers ("REPs") from January 2002 through April 2002 requesting payments for discounts to customers; (2) payment requests submitted by PUCT to the Comptroller of Public Accounts (the "comptroller") for payment of System Benefit Funds to REPs for March 2002; (3) correspondence between PUCT and the comptroller from February through April 2002 relating to budget requirements and payments from System Benefit Funds for any purpose; and (4) PUCT working papers used to prepare payment authorizations for REPs since January 1, 2002. You contend that PUCT did not have reimbursement reports for the month of April 2002 at the time of the request for that information. We note that the Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). Furthermore, while you state that PUCT has released some responsive information, you claim that some of the requested information is excepted from disclosure under section 552.137 of the Government Code. You also indicate that the release of some of the requested information may implicate the proprietary rights of eleven third parties, including Mutual Energy CPL, Mutual Energy WTU, POLR Power, AEP Texas Commercial & Industrial Retail, Entergy Solutions, Reliant Energy Retail Services, StarEn Power, TXU Energy Retail Company, TXU SESCO Energy Services Company, First Choice Power, and Green Mountain Energy Company. Accordingly, you notified these third parties of the request pursuant to section 552.305 of the Government Code. In turn, ten of the notified third parties have submitted to this office

arguments for withholding portions of the requested information. We have also received arguments from the requestor. *See* Gov't Code § 552.304. We have considered all of the submitted arguments and reviewed the submitted information.

We begin by addressing your argument that some of the requested information is subject to section 552.022(a)(3) of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

....

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body

Gov't Code § 552.022(a)(3). You contend that portions of the submitted reimbursement reports and SBF payment authorizations, and all of the submitted PUCT Purchase Vouchers are subject to this provision. We agree that the submitted PUCT Purchase Vouchers are subject to section 552.022(a)(3) and, therefore, must be released unless they are confidential under other law. However, while the remaining information relates to the expenditure of public funds, the information is not in an account, voucher, or contract, and therefore, is not subject to section 552.022(a)(3). Furthermore, sections 552.101, 552.110, and 552.137 are considered confidentiality provisions for the purpose of section 552.022. Thus, we will address the arguments under sections 552.101, 552.110, and 552.137 with respect to the vouchers.

We begin, however, by addressing the argument of Mutual Energy CPL, Mutual Energy WTU, POLR Power, AEP Texas Commercial & Industrial Retail (collectively referred to as "AEP") that information in its reimbursement reports is excepted from disclosure under section 552.104 of the Government Code. The purpose of section 552.104 of the Government Code is to protect a governmental body's interests in competitive bidding situations. Open Records Decision No. 592 (1991). Thus, section 552.104 protects the interests of governmental bodies, not third parties. *Id.* Because PUCT does not raise section 552.104, this section is not applicable to AEP's reimbursement reports. *Id.* (Gov't Code § 552.104 may be waived by governmental body).

AEP, Entergy Solutions ("Entergy"), and TXU Energy Retail Company and TXU SESCO Energy Services (collectively referred to as "TXU") also contend that the information in their reimbursement reports is excepted from disclosure under section 552.101 of the Government Code in conjunction with provisions of the Utilities Code. Section 552.101 of the

Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. AEP and Entergy contend that information in their reimbursement reports is confidential under section 17.004 of the Utilities Code. Section 17.004 provides, in relevant part, “All buyers of telecommunications and retail electric services are entitled to . . . privacy of customer consumption and credit information” Util. Code § 17.004(a)(6). Similarly, section 39.101 of the Utilities Code provides that “[b]efore customer choice begins on January 1, 2002, the commission shall ensure that retail customer protections are established that entitle a customer . . . to privacy of customer consumption and credit information” *Id.* § 39.101(a)(2). AEP and Entergy each contend that their reimbursement reports contain customer information that is confidential under either section 17.004, section 39.101, or both. However, upon review of the information at issue, we find that the information consists of aggregate customer information. Furthermore, it does not appear, nor do the parties explain, how this aggregate information could be related to any individual customer. Therefore, we find that none of the submitted information is confidential under either section 17.004 or section 39.101 of the Utilities Code.

AEP also contends that some of the information in its reimbursement reports is confidential under section 32.101 of the Utilities Code. Section 32.101 provides:

(a) An electric utility shall file with each regulatory authority a tariff showing each rate that is:

(1) subject to the regulatory authority’s original or appellate jurisdiction; and

(2) in effect for a utility service, product, or commodity offered by the utility.

(b) The electric utility shall file as a part of the tariff required under Subsection (a) each rule that relates to or affects:

(1) a rate of the utility; or

(2) a utility service, product, or commodity furnished by the electric utility.

(c) The commission shall consider customer names and addresses, prices, individual customer contracts, and expected load and usage data as highly sensitive trade secrets. That information is not subject to disclosure under Chapter 552, Government Code.

Clearly, this provision applies to tariff filings of an electric utility, and not the reimbursement reports filed by the REPs. Therefore, we find that none of the submitted information is confidential under section 32.101 of the Utilities Code.

TXU contends that information in its reimbursement reports is confidential under section 39.001 of the Utilities Code. Section 39.001 provides, in relevant part, "The legislature finds it is in the public interest to . . . protect the competitive process in a manner that ensures the confidentiality of competitively sensitive information during the transition to a competitive market and after the commencement of customer choice." Util. Code § 39.001(b)(4). Although this section indicates that there is a public interest in protecting competitively sensitive information, it does not explicitly make information confidential. *See* Open Records Decision Nos. 658 at 4 (1998), 478 at 2 (1987), 465 at 4-5 (1987). Therefore, none of the submitted information may be withheld under section 39.001 of the Utilities Code.

Next, we turn to the third parties' arguments that portions of the requested information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. Each individual business entity claiming section 552.110(a) or (b) bears its own burden for proving that its information falls under one of these prongs. *See* Gov't Code § 552.110; Open Records Decision No. 661 at 5 (1999). With respect to the trade secret prong of section 552.110, we note that the Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).¹ This office has held that when, as here, a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a business entity's claim for exception as valid under that branch if that entity establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

A business entity raising the commercial and financial information prong of section 552.110 is required to provide this office a specific factual or evidentiary showing, not conclusory or generalized allegations, that it would suffer substantial competitive injury from disclosure of its information. Gov't Code § 552.110(b); *see* Open Records Decision No. 661 (1999).

AEP contends that information in its reimbursement reports is excepted under both prongs of section 552.110. However, AEP does not make a *prima facie* showing that any of the information in its reimbursement reports constitutes a trade secret. Furthermore, while AEP contends that release of the information in its reports would reveal details about its customer pricing, market penetration, marketing emphasis, and customer usage patterns, AEP does not make a specific factual demonstration that revealing this information would cause it substantial competitive harm. Therefore, we find that AEP has not adequately demonstrated that any of the information in its reimbursement reports is excepted from disclosure under section 552.110(a) or (b). Similarly, Reliant Energy Retail Services and StarEn Power (collectively referred to as "Reliant") contend that lines 7 through 30 of their reimbursement reports are excepted from disclosure under both subsections (a) and (b) of section 552.110. However, Reliant does not adequately demonstrate that the information constitutes a trade secret or that release of the information would cause it substantial competitive harm. Furthermore, despite Green Mountain Energy Company's ("Green Mountain") contention that the information in lines 7 through 30 of its reimbursement reports is excepted from disclosure under section 552.110(a) and (b), Green Mountain does not make a *prima facie*

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

showing that the information consists of a trade secret or a specific factual demonstration that the release of its information would cause it substantial competitive harm. Therefore, PUCT may not withhold any portion of AEP's, Reliant's, or Green Mountain's information under section 552.110.

Entergy also contends that information in its reimbursement reports is excepted from disclosure under section 552.110(a) and (b). Specifically, under section 552.110(b), Entergy contends that the release of the information in lines 7 through 30 of its reimbursement reports would reveal information about Entergy's market penetration for the low income customer, low income customer usage patterns, and Entergy's marketing strategies. If this information were released, Entergy argues that "competitors would be able to determine whether, where, and how Entergy Solutions is focusing its marketing activities and would thus be able to target their own efforts to Entergy Solutions' detriment." Based on Entergy's argument, we find Entergy has demonstrated that release of the information gathered on lines 10 through 18 of Entergy's reimbursement reports would cause it substantial competitive harm. However, Entergy has not adequately demonstrated how the release of lines 7, 8, 9, 19, and 30 would cause it substantial competitive harm. Furthermore, Entergy has not demonstrated that Lines 7, 8, 9, 19, and 30 of its reimbursement reports contain trade secret information. Therefore, PUCT must withhold the information gathered on lines 10 through 18 of Entergy's reimbursement reports under section 552.110(b). We have marked the Entergy information that must be withheld throughout the submitted documents.

TXU likewise argues that information in its reimbursement reports constitutes confidential trade secret and commercial and financial information for the purpose of section 552.110. Under section 552.110(b), TXU contends that lines 7 through 30 of its reimbursement reports "reveal critical details about [TXU's] market segmentation and market penetration strategies, on a region-by-region basis within the State." According to TXU, competitors could use this information to determine the rate at which TXU is acquiring certain customers, and thus would be able to target attractive marketing areas. TXU therefore argues that the release of lines 7 through 30 of its reimbursement reports would seriously and adversely affect the ability of TXU to develop business in new regions and retain customers in their historical market areas. Based on TXU's arguments, we agree that the release of the information gathered on lines 10 through 18 of TXU's reimbursement reports, would cause it substantial competitive harm. However, we find that TXU has not adequately demonstrated how the release of the information on lines 7, 8, 9, 19, and 30 of its reports would cause it substantial competitive harm. Similarly, we find that TXU has not demonstrated that the information on lines 7, 8, 9, 19, and 30 consists of trade secret information. Therefore, while the information gathered on lines 10 through 18 of its reimbursement reports must be withheld under section 552.110(b) throughout the submitted documents, none of the remaining TXU information may be withheld under section 552.110(a) or (b). We have marked the information that must be withheld.

We note that although First Choice Power was notified pursuant to section 552.305 of the Government Code, it has not provided this office with any arguments. Therefore, First Choice Power has provided this office with no basis to conclude that its information is excepted from disclosure. See Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Nevertheless, we note that portions of First Choice's information, as well as portions of the remaining information, are excepted from disclosure under section 552.137 of the Government Code. Section 552.137 provides that "[a]n e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Public Information Act]."² Therefore, unless the relevant individuals have affirmatively consented to the release of their e-mail addresses, PUCT must withhold the e-mail addresses in the submitted information that we have marked under section 552.137.

In summary, PUCT must withhold the information gathered on lines 10 through 18 of Entergy's and TXU's reimbursement reports, which we have marked throughout the submitted documents, under section 552.110(b) of the Government Code. PUCT must also withhold the e-mail addresses we have marked under section 552.137 unless the individuals to whom the e-mail addresses belong have consented to their release. PUCT must release the remainder of the submitted information.³

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

²The identical exception has been added as section 552.136 of the Government Code.

³You seek a previous determination from this office allowing the PUCT to withhold or release the same type of information at issue in these requests from future requestors without the necessity of requesting a decision from this office. We decline to issue such a ruling at this time.

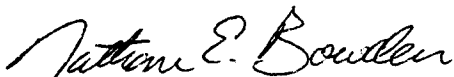
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden
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NEB/sdk

Ref: ID# 165199

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